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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. [redacted]42

EDWARD TILLMAN,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Petitioner, Edward Tillman, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered in the above entitled cause on the 18th day of November A. D. 1953. Petition for Rehearing was denied, on January 18, 1954.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported in 1 Ill. 2nd, 525, Illinois Supreme Court No. 32664 and is as follows:

"Docket No. 32664—Agenda 5—May, 1953.
"The People of the State of Illinois, Defendant
In Error v. Edward Tillman, Plaintiff
In Error.

"Mr. Justice Bristow delivered the opinion of the court;

"After a trial without a jury, in the criminal court of Cook County, defendant, Edward Tillman was found guilty of the crime of unlawfully possessing narcotic drugs. He was convicted and sentenced under the second count of the indictment, which charged him, in addition, with having been previously convicted of a similar offense and having been sentenced therefor by the Municipal Court of Chicago to confinement in the Chicago House of Correction for a period of six months. For the present offense defendant was sentenced to the penitentiary for a term of not less than fifty years nor more than life. He brings the record to this court for review by writ of error.

"Defendant contends, first, that the court erred in denying his motion to quash count II of the indictment, on the ground that the statute requires the previous conviction to be a felony, before the penalty for a subsequent offense can be imposed. Section 23 of the Uniform Narcotic Drug Act, under which defendant was convicted, relates to penalties for violation and subsequent offenses. It provides, in so far as it is relevant, that 'Whoever violates this Act by possession, having under his control, manufacturing or compounding any narcotic drug shall be fined for the first offense not more than $5000, or be imprisoned for a period of not less than one year nor more than

five years, or both. For any subsequent offense the violator shall be imprisoned in the penitentiary for any term from two years to life. * * * Any offense under this Act shall be deemed a subsequent offense if the violator shall have been previously convicted of a felony under any law of the United States of America, or of any State or Territory or of the District of Columbia relating to narcotic drugs.' Ill. Rev. Stat. 1951, chap. 38, par. 192.23.

"The prior conviction of the defendant, as alleged in the second count of the indictment, was for unlawful possession of narcotic drug 'in violation of paragraph 192.2, Chap. 38, Ill. Rev. Stats. of 1945,' for which the maximum penalty was a fine not exceeding one thousand dollars, or imprisonment in the county jail for a term not exceeding one year, or both such fine and imprisonment.

"The People argue that the term 'felony' as used in this statute refers only to prior convictions under the laws of the United States or of States other than Illinois, and that it has no application to prior convictions under the Illinois act. It is agreed that the prior conviction involved was a misdemeanor and was not a felony. This court had occasion to pass upon this identical issue in the case of *People* v. *Shamery*, 415 Ill. 177. There we held adversely to all contentions made by plaintiff in error herein and we adhere to that view. The court acted properly in overruling the motion to quash count II.

"Defendant next contends the court erred in denying his motion to suppress evidence discovered by a search of the room in which he resided. The record discloses that on Wednesday, April 9, 1952, at or about 10 o'clock a. m., a Chicago police officer received a telephone call from an unidentified person, who informed him that there was a man called Trench Coat—a tall, slim, brown-skinned, colored man about twenty-five or thirty years of age with a gold tooth in the

front of his mouth—living in Room 212 of the Strand Hotel with a heavy-set woman, and that this man peddled narcotics and had sold narcotics on the previous evening to an addict. About an hour later this police officer and a partner arrived at the hotel, proceeded to the second floor, and observed a heavy-set woman wearing a robe, standing in the hall in front of Room 212. The door to the room was partly open, and the police officer observed defendant lying in bed inside the room. The latter resembled in appearance the description given by the unidentified informant on the telephone. The officer arrested the woman, brought her into the room, and searched her, finding five capsules of heroin in the pocket of her robe. He then awakened the defendant, who had been asleep on the bed, and arrested him. In the course of a conversation with the police officer defendant stated that some people called him Trench Coat. The officer raised the mattress from the bed and found a box containing ninety-five capsules of what was later ascertained to be heroin. Defendant admitted the box of capsules belonged to him.

"From the petition in support of defendant's motion to suppress evidence, and the hearing thereon, it appears that the hotel room in question was occupied by defendant as his home, and that no warrant was obtained for defendant's arrest or for a search of the premises. Defendant insists that his arrest was unlawful, that the search of his room was unreasonable and unlawful, and that such unlawful arrest and search were in violation of his constitutional rights and that his motion to suppress evidence should have been sustained.

"Section 6, of article II of the Illinois constitution is as follows: 'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable

cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.'

"The provision of the constitution of the United States, relied upon by plaintiff in error, while in somewhat different language, is in effect the same, and the provisions of the two constitutions are construed alike and should be liberally construed in favor of the accused. *People* v. *Grod,* 385 Ill. 584.

"A long line of decisions which interpret both the Federal and State constitutions have established the proposition beyond contradiction that the search without warrant of the person and of the vehicle or place where the arrest is made and which is under the control of the accused, subsequent and incident to a lawful arrest, in order to find and seize things connected with the crime or its fruits, or as the means by which it was committed, is law and not a violation of the accused's constitutional rights. (*United States* v. *Rabinowitz,* 339 U. S. 56, 94 L. Ed. 653; *People* v. *McGowan,* 415 Ill. 375; *People* v. *Tabet,* 402 Ill. 93; *People* v. *Exum,* 382 Ill. 204; *People* v. *Marvin,* 358 Ill. 426; *People* v. *Brown,* 354 Ill. 420; *People* v. *Davis,* 354 Ill. 158; *People* v. *Hord,* 329 Ill. 117.) In each of the foregoing cases a search, either of premises or vehicle, within the control of the arrested party or of the person of the arrested party, was held reasonable and lawful as an incident to a lawful arrest.

"The search of the premises here involved being without benefit of a search warrant, the basic issue to be resolved, in order to determine the validity of the position of plaintiff in error, is whether or not his arrest was lawful.

"Section 4 of division VI of the Illinois Criminal Code (Ill. Rev. Stat. 1951, chap. 38, par. 657), provides as follows: 'An arrest may be made by an officer or by a private person without warrant, for a crim-

inal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable grounds for believing that the person to be arrested has committed it.'

"In construing this provision of the Illinois Criminal Code, we have consistently held that an officer has the right to arrest without a warrant provided it is shown that a criminal offense has in fact been committed and the arresting officer has reasonable grounds for believing that the person to be arrested is implicated in the offense. *People* v. *Martin*, 382 Ill. 192; *People* v. *Humphreys*, 352 Ill. 340; *People v. McGurn*, 341 Ill. 632; *People* v. *Swift*, 319 Ill. 359; *People* v. *Mirbelle*, 276 Ill. App. 533; *People* v. *Fischetti*, 273 Ill. App. 215.

"The constitutional guaranties invoked are a protection against unreasonable searches and seizures. If an officer has reasonable grounds for believing a person is implicated in a criminal offense, he has a right to arrest and search without a warrant. There is no formula for a determination of what is reasonable. The constantly recurring problem in this field must separately find resolution in the facts and circumstances of each case.

"The officers in this case, pursuing their duties in their daily wrestle with crime and criminals, answered a telephone call from some unidentified person. They were told that in Room 212 of the Strand Hotel in the city of Chicago, there was a man called Trench Coat, of a certain description, who was peddling narcotics, and that on the previous evening he had sold narcotic drugs to an addict. Of great importance, too, they were told that Trench Coat had a confederate operating with him—a heavy-set woman. Armed with this information the officers promptly went to the Strand Hotel, proceeded to the second floor, and thence through the hallway to Room 212. There they found a

heavy-set woman standing in the hall in front of Room 212 wearing only a robe. The door to Room 212 was slightly ajar, so that they could see a man lying asleep upon a bed in the room, and his description matched perfectly the one outlined in the anonymous telephone call. The officers searched the woman and found five capsules of heroin. The colored man upon being awakened admitted that he was called Trench Coat.

"Did the officers act unreasonably in their arrest of the defendant, We think not. Whoever informed the officer about Trench Coat had been correct in every detail. Section 2 of the act relating to narcotic drugs reads as follows: 'It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this Act.' (Ill. Rev. Stat. 1951, chap. 38, par. 192.2) Searching the defendant, the officers found 95 capsules of what was later ascertained to be heroin. Finding narcotics on defendant's confederate gave much support to the officer's belief that Trench Coat was trafficking in narcotics. Certainly, the defendant and his confederate were committing a crime in the presence of the officers, because without contradiction they were in possession of, and had under their control, narcotic drugs in violation of the above section.

"Next, we are confronted with the inquiry as to whether the search was unreasonable. The 95 capsules of heroin were found in the bed upon which the defendant was sleeping. In the *Rabinowitz* case, there was a valid arrest and a random and far-reaching, rummage and search. Every desk, safe, closet, nook and corner in defendant's place of business was searched. Countenancing such a search, the majority opinion relied upon *Carroll* v. *United States,* 267 U. S. 132: 'When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him

to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.' Cited also is *Agnello* v. *United States*, 269 U. S. 20, at p. 30: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruit or as a means by which it was committed as well as weapons and other things to effect an escape from custody is not to be doubted.' Justice Frankfurter in his able dissenting opinion at page 437 said: 'With all respect I suggest that it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of legality of an arrest.' However, Justice Frankfurter went on to say that if searches following a legal arrest were to be approved, the area must be limited and circumscribed. In this connection he used this language: 'The teaching of those cases is that the warrant of arrest carries with it authority to seize all that is on the person or in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person.' Finding the capsules in the bed upon which the defendant was lying in such immediate physical relation to him, and applying the most critical test, the search in this case may be properly deemed reasonable. The very restricted area of the search involved may reasonably be said to be a part of the person.

"Finding no reversible error, the judgment entered herein should be and is affirmed.

"Judgement affirmed.

"Mr. Justice Maxwell, dissenting in part and specially concurring in part:

"For the reasons set forth in my dissent in *People* v. *Shamery*, 415 Ill. 177, 181, I cannot agree to the overruling of the defendant's motion to quash count

II of this indictment. I think that motion should have been allowed.

"I concur in that part of this opinion finding the search and seizure reasonable only because I regard the close physical proximity and the defendant's exclusive control of the possession of these narcotics as being equivalent to possession 'on his person.''

"Mr. Justice Klingbiel, dissenting:

"I cannot agree with the majority opinion, for with all respect, I suggest that it makes a mockery of section 6 of article II of the Illinois constitution which provides that the right of the people to be secure against unreasonable searches and seizures shall not be violated.''

Jurisdiction.

This Court's jurisdiction is invoked under Title 28 Section 1257, United States Code Annotated this being an appeal from the opinion of the highest court of the State of Illinois which opinion involves and is repugnant to the Fourth and Fourteenth Amendments to the United States Constitution.

Questions Presented.

1. Does the Fourth Amendment to the United States Constitution permit police officers to enter the home of a citizen, arrest him and search his person and home without a warrant authorizing either the arrest or the search being at the time of the entry, which was made solely for arrest and search, armed solely with telephoned information received from an an anonymous caller that the person to be arrested had sold narcotics to an unnamed addict at an unnamed place the night before?

2. Did the action of the police officers as mirrored in the record deprive plaintiff in error of the right to a judicial determination of probable cause for his arrest and the search of his home?

3. Does the protection of the Fourth Amendment extend to plaintiff in error the right to have determined the existence or non-existence of probable cause?

4. Would not the powers given to police officers by the Illinois Court in this case reduce the Fourth Amendment to the Constitution to a nullity and leave the peoples' homes and liberty, secure only at the discretion of police officers?

5. Where, must the right of privacy yield to the right of search? Should the decision be made by police officers rather than a judicial officer?

6. Does the record show any legal reason given by the arresting officers for not obtaining a warrant for the arrest of plaintiff in error and a search warrant to search his premises?

7. Should the court condone the acts of the police officers in the case at bar where the arrest was made without a warrant and a search of the home of plaintiff in error was made without a search warrant, when such acts would be valid only if a crime, in fact, had been committed of which the arresting officers had knowledge at the time of the said arrest, and then, only, if the officers had reasonable ground upon which to base a belief that such crime had been committed by plaintiff in error?

8. Did the court overlook the fact that the legal cause assigned by the police officers for the entry into the home of and arrest of plaintiff in error without a warrant was the charge that plaintiff in error had sold narcotics to an addict the night before the arrest and that such charge was not proven nor was any evidence offered or received in support of same?

9. Did the court overlook the fact that, upon the record in the case at bar, when the plaintiff in error made a motion to suppress the evidence on the ground of illegal arrest that, by law, it became the duty and burden of the police officers to establish by affirmative evidence the legality of the arrest?

10. Did the court overlook the fact that the entry of the police officers into the home of plaintiff in error was illegal, constituted a trespass, and was a violation of his constitutional rights?

11. Has the plaintiff in error been deprived of his liberty without due process of law contrary to the Fourth and Fourteenth Amendments to the United States Constitution?

Statement.

The plaintiff in error Edward Tillman, was indicted in April, 1952, by a grand jury of Cook County, Indictment No. 52-0965, charging him in count I of the indictment with unlawfully, wilfully and knowingly being possessed and having under his control otherwise than as authorized by law of the State of Illinois, then in force and effect, a large amount, to-wit: 100 capsulesful of a certain narcotic drug, to-wit: opium; to which indictment plaintiff entered a plea of not guilty and waived trial by jury, and before trial plaintiff in error moved, in apt time, to suppress the evidence and filed a written petition in support thereof (Abst. 12-14); said motion was overruled and petition denied.

Upon the hearing of the motion to suppress the evidence, the testimony of the arresting officer, Walter McCarthy (Abst. 15-22) was as follows:

That he was a police officer of the City of Chicago; that he arrested Edward Tillman on April 9, 1952, at 11:00 a.m.; that at the time of the arrest the plaintiff in error was in room 212 of the Strand Hotel; that he had no warrant for the arrest of plaintiff in error; that prior to going to the Hotel, he had not seen the plaintiff in error, Edward Tillman; that after going to the hotel he searched the room of plaintiff in error after making the arrest; that after making the arrest the room was searched; that before the arrest, he did not see plaintiff in error commit any crime or criminal offense; that as the result of the arrest and of the search he was possessed of certain evidence which he intended to introduce at the trial of the cause. The officer further testified that before going to the Strand Hotel he received a tele-

phone call from a man on April 9; that the man gave a description of a man known as Trench Coat—tall, slim brownskinned colored man about 25 or 30 years of age, with a gold tooth in front in his mouth; that he was in room 212 of the Strand Hotel, living with a woman who was heavy-set; that this man was peddling narcotics and had sold narcotics to an addict on the previous evening; that the informant knew the addict to whom the drugs were sold. That upon going to the Strand Hotel, he went to room 212, a woman was standing in front of the door talking, the door was partly open; that he saw plaintiff in error in the room lying on the bed; that the description of the man lying on the bed fit the description that he had received by telephone; that the woman standing in the door of room 212, was a heavy set woman; that he arrested the woman and took her into the room; that after the arrest of the woman and a search of her person, he found 5 capsules of heroin in her robe pocket; that plaintiff in error was sleeping on the bed; that the officer arrested him; that the man admitted that he was sometimes called Trench Coat. That he had a conversation with the woman Clara Brooks before Trench Coat; that plaintiff in error was placed under arrest; that the search begun after the arrest by raising up the mattress of the bed on which plaintiff in error was sleeping, and as a result of the search found a box containing 95 capsules of heroin.

The officer further testified that the man from whom he got the information concerning the Strand Hotel, the plaintiff in error and Clara Brooks, and the room in which they lived, did not give any name; that this telephone call was received about 10:00 oclock in the morn-

ing of April 9th, and that the officer did not appear before a judge and obtain either a warrant for the arrest of plaintiff in error, or a search warrant to search the premises; that the man giving the information by telephone refused to give his name; that April 9th was not a Holiday, nor was it a Sunday or Saturday; that by the calendar, April 9th was on a Wednesday, and the courts in the city of Chicago were open at the time he received the information on the telephone. After this testimony by the arresting officer, the motion to suppress was denied.

Upon the trial of the cause, the same witness who previously testified on the motion to suppress evidence, gave substantially the same testimony (Abst. 22-29). The 95 capsulesful of heroin taken from underneath the mattress on which plaintiff in error was asleep was introduced in evidence as "People's Exhibit 1." The officer testified that plaintiff in error admitted that "People's Exhibit 1," belonged to him. The officer further testified that prior to the time that he arrested plaintiff in error he had actual knowledge that plaintiff in error had committed a crime, which is set forth verbatim as follows:

Q. What crime was that?

A. That he sold narcotics.

Q. And to whom had he sold the narcotics?

"A. I don't know the name.

"Q. When did he sell the narcotics?

"A. The previous day.

"Q. The previous day. And where did you get that?

"A. From the party that called on the telephone.

"Q. From the party that called on the telephone?

"A. Yes, sir.

I got the telephone call the day of the arrest, the party stated the defendant had made the sale the previous day.

The party that called said the man's name was Trench Coat. He did not tell me the name of the party to whom the sale was made.

"Q. You didn't know who was talking?

"A. No, I didn't.

"Q. And so all you did was just take the word of this anonymous telephone caller, is that right?

"A. Yes.

"Mr. Papanek: I object to the form of the question.

"The Court: Yes.

"Witness: I took the information. Aside from the telephone call, I had no actual knowledge of any crime having been committed by this defendant."

Upon this evidence there was a finding of guilty. Plaintiff in error appealed to the Supreme Court of Illinois, where the judgment of the lower court was affirmed. Petition for rehearing was filed and denied, and plaintiff in error comes to this Court by petition for writ of certiorari.

Specification of Errors To Be Urged.

The Supreme Court of the State of Illinois, erred:

1. In overlooking the fact that the action of the police officers, as mirrored in the record, deprived plaintiff in error of the right to a judicial determination of probable cause for his arrest and the search of his home as guaranteed by Article 2, Section 6 of the Constitution of Illinois and the Fourth Amendment to the Constitution of the United States.

2. In overlooking the fact that the *entry* of officers into the home of plaintiff in error for the purpose of arrest and search was illegal and in violation of Article 2, Section 6 of the Illinois Constitution and the Fourth Amendment to the United States Constitution.

3. In holding that police officers armed only with anonymous information received from an unknown and unnamed telephone caller, that plaintiff in error had sold narcotics under circumstances not made clear to an unnamed nor otherwise identified addict at an unnamed place at an unstated time the night before, acted reasonably within the meaning of Article 2, Section 6 of the Constitution of Illinois and the Fourth Amendment to the Constitution of the United States, in entering the home of plaintiff in error after observing him asleep in his bed therein through his open door, and arresting him without a warrant for no crime or offense of which they had knowledge, and searching his person and home, also without a warrant, but for the purpose of possibly discovering evidence of some offense.

4. In overlooking the fact that no legal reason is given by police officers for failure to obtain a warrant

for the arrest of plaintiff in error, and a search warrant to search his home.

5. In overlooking the fact that the cause for the arrest of plaintiff in error assigned by the police officers was the charge that plaintiff in error had sold narcotics to an addict the night before the arrest, and that such charge was not proven nor was any evidence offered or submitted in support of same.

6. In overlooking the fact that when plaintiff in error moved to suppress the evidence on the ground of illegal arrest, by law, it became the duty and the burden of the defendant in error to establish by affirmative evidence the legality of the arrest.

7. In holding the search in the case at bar to have been of the person and not the home of plaintiff in error.

Reasons for Granting the Writ.

1. The Courts of Illinois follow the Federal Rule that evidence obtained in violation of the Fourth Amendment to the United States Constitution shall be excluded in a criminal trial. *People* v. *Albea*, Illinois Supreme Court Number 33020; *People* v. *Grod*, 385 Ill. 584; *People* v. *Martin*, 382 Ill. 192.

2. The decision of the Supreme Court in the case at bar is in direct conflict with the decision of said court in *People* v. *Elias*, 316 Ill. 376, 147 N.E. 472, at 474, where the court states:

> "Whether there is probable cause for issuing a search warrant is a judicial question to be determined by the magistrate before whom complaint is made. * * * "

In accordance with the test of this rule set forth in the case last above referred to, probable cause is not shown for the entry into and arrest and search of the home of the plaintiff in error by officers without a search warrant. *People* v. *Prall*, 314 Ill. 518, 145 N.E. 610; *Salter* v. *The State*, 2 Okla. Crim. 164, 102 Pac. 719.

3. Unquestionably, plaintiff in error was entitled to the right to have the determination of the existence or non-existence of probable cause for arrest and search of his home first decided by the judicial arm of the government. *Johnson* v. *United States*, 333 U. S. 10, 68 Sup. Ct. 367.

In the case last above referred to, at page 369, the court stated as follows:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead

> of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. * * * "

This rule should be determinative of the validity of the opinion issued by the Supreme Court of the State of Illinois, for in the light of this succinct statement by the Supreme Court of the United States, plaintiff in error has been denied the protection of the Fourth Amendment to the Constitution of the United States of America. To the same effect in *United States* v. *Lefkowitz,* 285 U. S. 452, 464, 52 Sup. Ct. 420, at p. 423:

> " * * * Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.* * * "

We believe that the authority cited is sufficient to show conclusively that the constitutional rights of plaintiff in error were violated by the opinion of the Supreme Court of Illinois, as provided in the Fourth Amendment to the Constitution of the United States of America, and that the opinion of that court thus stands in violation of the prohibition upon the states embodied in the Fourteenth Amendment, that no person shall be deprived of liberty without due process of law.

4. That the entry of the officers in the case at bar into the home of plaintiff in error with no warrant seems clearly illegal from the opinion in the case of *Agnello et al.* v. *United States,* 269 U. S. 20, 46 Sup. Ct. 4, at p. 6, to the effect:

> "That the protection of the Fourth Amendment extends to all equally, to those justly suspected or accused as well as to the innocent. The search of a private dwelling without a warrant is, in itself unreasonable and abhorrent to our laws."

5. The Fourth Amendment to the Constitution of the United States is the same as Article 2, Section 6, of the Constitution of the State of Illinois, and both of these were urged by plaintiff in error in the Courts below. (See opinion in this petition, page 5)

6. In *Johnson* v. *United States,* 333 U. S. 10, Sup. Ct. 367, at p. 369, this court said:

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

7. The court in considering the same question in the case at bar in its opinion in *Johnson* v. *United States,* 333 U. S. 10, 68 Sup. Ct. 367, at p. 369, enunciates the following rule:

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officer and some slight delay necessary to prepare papers and present the evidence to a magistrate."

In the case at bar, not even this excuse was offered for failure to procure a search warrant or a warrant of arrest, despite the fact that it was a court day, the courts were open and the information was received early in the morning. Plaintiff in error was not fleeing, nor was he likely to take flight, but on the contrary, was asleep in bed, at home. There is no claim by the officer that the evidence in this case would perish, if the arrest were delayed.

While the opinion in the case at bar recites that a crime was being committed in the officers presence (page 7 herein) it is obvious that the officers observed no offense being committed prior to the unlawful entry into the home of plaintiff in error and the illegal arrest and

search and it is a well known principle that the arrest and search cannot be justified by the results thereof. *Johnson* v. *U. S.*, 333 U. S. 10, 68 Sup. Ct. 367.

8. The evidence in the record in the case at bar, shows that the police officers had ample time to procure a warrant of arrest. This Court said in *Johnson* v. *United States*, 333 U. S. 10, 68 Sup. Ct. 367, at p. 369, to the effect that:

> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right or privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant."

9. In *Wood* v. *Olson*, 117 Ill. App. 128; at p. 132; and *Levine* v. *Costello*, 214 Ill. App. 505, at p. 511, the Appellate Court of Illinois states as follows:

> "Before there can be a legal arrest for a crime not committed in the presence of an officer without a warrant the evidence must show in effect, that a crime has been in fact committed."

In the case at bar, there is no proof that narcotics had been sold by the plaintiff in error the night before, or ever, to an addict or any other person, and hence, there is not in the record any justification for the arrest of plaintiff in error and a search of his home without a warrant and a search warrant, since the record does not show the commission of a crime in the presence of the arresting officers.

10. In the case of *Raucci et al.* v. *Connelly et al.*, 340 Ill. App. 280, 91 N.E. (2d) 735, at p. 739, the Appellate Court of Illinois sets forth a rule which should govern police officers in a case such as the case at bar,

> "A police officer, '*When a criminal offense has in fact been committed and he has reasonable ground* for believing that the person to be arrested has committed it,' may make an arrest, but to justify the arrest his belief that the person to be arrested is guilty of the crime must be such as would influence the conduct of a cautious and prudent man under the circumstances. *People* v. *Scalisi*, 324 Ill. 131, 146, 147, 154 N.E. 715."

11. Besides being in direct opposition to the principles announced by this court in *Johnson* v. *United States*, and with other cases decided by the Supreme Court of Illinois, the opinion in the case at bar is hopelessly irreconcilable with the principles announced in the following case:

Henderson v. *United States*, 4th Cir., 12 F. 2nd 528, where the court held that a search made without a warrant after gaining admission to a defendant's store in the company of informers who had purchased narcotics there from defendant with marked money, and made upon the arrest therein of defendant, finding narcotics on a dresser

in his bedroom, was in violation of the Fourth Amendment. The Court said in that case:

> "Can it be law that an officer for the purpose of seeking evidence, may invade the home of a citizen and search it without the oath or affirmation required by the constitution, and without having the question of probable cause determined by a judicial officer, upon merely deciding for himself that there is probable cause to believe that some person within the home is guilty of a felonious violation of a revenue act. • • • And when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest was a pretext for or at most an incident of the search, ought such search be held as a reasonable one within the meaning of the constitution? Manifestly not."

12. That the security of ones privacy against arbitrary intrusion by police is embodied in the concept of due process found in the Fourteenth Amendment to the United States Constitution is well established. *Wolf* v. *Colorado*, 338 U. S. 25 at page 27; *Rochin* v. *California*, 342 U. S. 165.

The question in the case at bar is not one of whether or not illegally obtained evidence should be excluded, but rather was the evidence upon which plaintiff in error was convicted obtained by a violation of his constitutional rights? The Court below found no violation and we believe this was error. Under the law of Illinois as shown in number 1 of these Reasons for Granting the Writ, if the evidence was unconstitutionally received, it shall be excluded unquestionably.

Conclusion.

For the reasons stated above this petition for writ of certiorari should be granted as there appears in the record a clear violation of Article 2, Section 6 of the Illinois Constitution and of the Fourth Amendment and Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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